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In the
Supreme Court of the United States.

OCTOBER TERM, 1978.

No. 78-486.

COUNCIL FOR EMPLOYMENT
AND ECONOMIC ENERGY USE,
PETITIONER,

v.

WHDH CORPORATION ET AL.,
RESPONDENTS.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT.

Brief for Respondents WHDH Corporation and General Electric Broadcasting Company, Inc., in Opposition.

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Table of Contents.

Opinions below 1

Jurisdiction 2

Questions presented 2

Statutes and regulations involved 2

Statement 2

Argument 5

I. Petitioner's complaint was properly on the basis of settled judicial interpretation of the scope of the Sherman Act 5

A. The discharge of Fairness Doctrine obligations is not proper subject matter for a Sherman Act complaint 5

B. Petitioner cannot establish any injury to business or property by reason of an antitrust violation 10

C. Petitioner cannot now seek review by this Court on the issue of injunctive relief which, in addition, affords no basis for review 13

II. Petitioner's motion to alter judgment and for leave to file an amended complaint was properly denied as a matter of judicial discretion and petitioner has failed to argue the denial of its motion in its petition as a reason for granting the writ 14

Conclusion 15

Table of Authorities Cited.

CASES.

Apex Hosiery Co. v. Leader, 310 U.S. 469 (1940) 5, 6

Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477 (1977) 12

California Motor Transport Co. v. Trucking Unlimited, 404 U.S. 508 (1972) 9

Council for Employment and Economic Energy Use v. FCC, 575 F.2d 311 (1st Cir. 1978), cert. denied, ___ U.S. ___ (1978) 4n, 10

Council for Employment and Economic Energy Use v. WHDH Corp., 580 F.2d 9 (1st Cir. 1978) 1, 10, 13

Donnelly v. Boston College, 558 F.2d 634 (1st Cir. 1977) 7

Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127 (1961) 8, 9, 10

Foman v. Davis, 371 U.S. 178 (1962) 14

Hawaii v. Standard Oil Co., 405 U.S. 251 (1972) 11

Helvering v. Minnesota Tea Co., 296 U.S. 378 (1935) 13

Kowall v. United States, 53 F.R.D. 211 (W.D. Mich. 1971) 14

Marjorie Webster Junior College, Inc. v. Middle States Assn. of Colleges and Secondary Schools, Inc., 432 F.2d 650 (D.C. Cir.), cert. denied, 400 U.S. 965 (1970) 6, 7

McKay v. Columbia Broadcasting System, Inc., 324 F.2d 762 (2d Cir. 1963) 8

Miley v. John Hancock Mutual Life Insurance Co., 148 F. Supp. 299 (D. Mass.), aff'd, 242 F.2d 758 (1st Cir.), cert. denied, 355 U.S. 828 (1957) 12

Miller & Son Paving, Inc. v. Wrightstown Township Civ. Assn., 443 F. Supp. 1268 (E.D. Pa. 1978) 7, 8

Multidistrict Vehicle Air Pollution M.D.L. No. 31 v. Automobile Manufacturers' Assn., Inc., 481 F.2d 122 (9th Cir.), cert. denied sub nom. Morgan v. Automobile Manufacturers' Assn., 414 U.S. 1045 (1973) 11, 12

North Texas Producers Assn. v. Young, 308 F.2d 235 (5th Cir. 1962) 11

Parmelee Transp. Co. v. Keeshin, 292 F.2d 794 (7th Cir.), cert. denied, 368 U.S. 944 (1961) 8

Red Lion Broadcasting Co. v. FCC, 395 U.S. 367 (1969) 9

Subscription Television, Inc. v. Southern Cal. Theatre Owners Assn., 576 F.2d 230 (9th Cir. 1978) 9

Ve-ri-tas, Inc. v. Advertising Review Council of Metropolitan Denver, 411 F. Supp. 1012 (D. Col. 1976) 10

CONSTITUTIONAL AND STATUTORY PROVISIONS.

United States Constitution, First Amendment 9

47 U.S.C. § 315(a) 9, 10

Clayton Act, § 4 11, 12

Sherman Act 5, 6, 7, 8, 9, 10, 13

§ 1 2, 5

§ 3 6

Mass. Gen. Laws, c. 55
§ 1 3
§§ 1 et seq. 11

MISCELLANEOUS.

Federal Rules of Civil Procedure, Rule 59(e) 2
Handler, Twenty-Five Years of Antitrust, 73 Colum. L. Rev. 415 (1973) 9
40 P & F Radio Reg. 2d 1509 10
Stewart, The Law of Initiative Referendum in Massachusetts, 12 New England L. Rev. 455 (1977) 11

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Opinions Below.

The opinion of the District Court (Petition, App. 1-3) is unreported. The opinion of the Court of Appeals for the First Circuit (Petition, App. 4-11) is reported at 580 F.2d 9.

Jurisdiction.

The jurisdictional requisites are adequately set forth in the petition.

Questions Presented.

I. Whether a political advertiser's allegations of monetary damages by reason of several radio broadcasters' joint allotting of air time to a public interest group opposing its position on a public initiative question as a means of discharging their "Fairness Doctrine" obligations state a claim that the political advertiser suffered injury to its business or property by reason of the broadcasters' violation of § 1 of the Sherman Act.

II. Whether the Court of Appeals erred in affirming the trial court's denial of a political advertiser's motion to alter judgment pursuant to Fed. R. Civ. P. 59(e) in light of the dismissal of its original complaint for failure to state a claim and in light of the failure of its proposed amended complaint to present any different claim.

Statutes and Regulations Involved.

The pertinent provisions of the statutes and regulations involved are set forth in the petition at pp. 3-9.

Statement.

This case involves an attempt by a political advertiser to characterize as anticompetitive activity the alleged awarding

of equal amounts of air time by several radio broadcasters to a rival political group as a means of discharging their Fairness Doctrine obligations.

According to its statement of organization, the Council for Employment and Economic Energy Use, a political committee defined by Massachusetts General Laws, c. 55, § 1, was created for the following purpose:

> "To encourage the creation of employment and opportunities in economic energy use in Massachusetts by defeating the Initiative Petition (H-4201) which will be placed before the electorate at the State biannual election in November (1976) as Question 7."

Question 7, if passed, would have had the effect of limiting discounts for volume purchasers of electricity. In furtherance of its stated purpose of defeating Question 7, the Council raised monies to conduct a political campaign against the elimination of volume discounts. As part of its political strategy, the Council resorted to extensive advertising in the media to convey its political message to the voters of the Commonwealth of Massachusetts. In this connection, it purchased some air time from several radio broadcasters, WHDH Corporation, General Electric Broadcasting Co., Inc., RKO General Broadcasting, Inc., and Plough Broadcasting Co., Inc. (hereinafter, "the broadcasters"). Each of the stations owned or operated by the broadcasters was in the radio area of the City of Boston.

During the course of the political campaign and prior to the biennial election of November, 1976, the respondent broadcasters afforded free air space to Fair Share, Inc., a public interest group supporting the passage of Question 7 and opposing the Council's position. On November 2, 1976, the Council

brought an action against the broadcasters alleging that they had entered into a conspiracy in restraint of trade by each affording Fair Share, Inc., one free spot for every two paid Council advertisements.[1] As a result of the vote in November, 1976, Question 7 was defeated and the Council accomplished its political purpose.

By stipulation, the parties extended the time in which the broadcasters could respond to the Council's complaint until the first week of January, 1977, after which time motions to dismiss were filed by the broadcasters.[2] The Council filed its opposition to the motions to dismiss on January 28, 1977; however, even after receiving three extensions of time in which to file a brief in opposition, the Council failed to submit such a brief. Its fourth motion for an extension was denied on May 5, 1977, and on May 10, 1977, the District Court entered an order that the Council's complaint be dismissed for failure to state a claim upon which relief could be granted. In addition, on May 24, 1977, the District Court denied motions of the Council to alter the judgment and vacate the order of dismissal.

The Court of Appeals affirmed the judgment of the District Court and awarded double costs to the broadcasters.

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[1] The complained of provision of air time has since been found a reasonable, permissible method by which the broadcasters were able to fulfill their duty under the Fairness Doctrine. *Council for Employment and Economic Energy Use* v. *FCC*, 575 F.2d 311 (1st Cir. 1978), cert. denied, ____ U.S. ____ (1978).

[2] WHDH Corporation and General Electric Broadcasting Co., Inc., filed answers denying generally the allegations of joint action and motions to dismiss; Plough Broadcasting Co., Inc., moved to dismiss or for summary judgment, and RKO General, Inc., filed an answer.

Argument.

I. Petitioner's Complaint was Properly Dismissed on the Basis of Settled Judicial Interpretation of the Scope of the Sherman Act.

A. *The Discharge of Fairness Doctrine Obligations is Not Proper Subject Matter for a Sherman Act Complaint.*

The dismissal of petitioner's complaint was based upon established principles of antitrust law enunciated by this Court and consistently applied by the lower courts. As held below, the Council's complaint does not state a claim upon which antitrust relief may be granted in that the allotment of air time by radio broadcasters, for the purpose of compliance with the Federal Communication Commission's Fairness Doctrine, to another public interest group opposing the Council's position on a public initiative question does not under any set of circumstances amount to a restraint upon trade or commerce within the meaning of § 1 of the Sherman Act. The conduct of the broadcasters in discharge of their Fairness Doctrine obligations is simply not the type of activity which the Sherman Act was intended to prohibit. No anticompetitive motive for the broadcasters' conduct has been alleged and none exists under the circumstances described in the complaint.

The decisions of the Supreme Court defining the intended scope of the Sherman Act compel the conclusion that an issue of the discharge of Fairness Doctrine obligations is not proper subject matter for an antitrust complaint. In *Apex Hosiery Co.* v. *Leader*, 310 U.S. 469 (1940), this Court stated:

> "It was enacted in the era of 'trusts' and of 'combinations' of businesses and of capital organized and directed to

control of the market by suppression of competition in the marketing of goods and services, the monopolistic tendency of which had become a matter of public concern. The end sought was the prevention of restraints to free competition in business and commercial transactions which tended to restrict production, raise prices or otherwise control the market to the detriment of purchasers or consumers of goods and services, all of which had come to be regarded as a special form of public injury." 310 U.S. at 492-493.

Keeping in mind the purpose of the Sherman Act, the Supreme Court "has never applied [it] in any case . . . unless the Court was of opinion that there was some form of restraint *upon commercial competition in the marketing of goods or services* . . .." 310 U.S. at 495 (emphasis supplied).

Adhering to these general principles enunciated by the Supreme Court, the lower federal courts have consistently limited the application of the Sherman Act to commercial matters. For example, in *Marjorie Webster Junior College, Inc.* v. *Middle States Assn. of Colleges and Secondary Schools, Inc.*, 432 F.2d 650 (D.C. Cir.), cert. denied, 400 U.S. 965 (1970), the United States Court of Appeals for the District of Columbia Circuit held that an association's refusal to accredit a junior college did not fall within the proscriptions of § 3 of the Sherman Act since the Act was "tailored . . . for the business world" and not applicable to "the non-commercial aspects of the liberal arts and the learned professions." 432 F.2d at 654. Even though accreditation status may have had a financial impact on the junior college, the association's refusal to accredit the school was not deemed commercial in the absence of an anticompetitive motive:

"It is possible to conceive of restrictions on eligibility for accreditation that could have little other than a commercial motive; and as such, antitrust policy would presumably be applicable. Absent such motives, however, the process of accreditation is an activity distinct from the sphere of commerce; it goes rather to the heart of the concept of education itself." 432 F.2d at 654-655.

Similarly, in *Donnelly* v. *Boston College*, 558 F.2d 634 (1st Cir. 1977), the Court of Appeals recognized that a claim of a law school applicant under antitrust laws based upon the rejection of his applications by several law schools must fail in the absence of a commercial objective for the complained of conduct. See also, *Miller & Son Paving, Inc.* v. *Wrightstown Township Civ. Assn.*, 443 F. Supp. 1268 (E.D. Pa. 1978).

In the present case, the broadcasters' allotting radio time pursuant to Fairness Doctrine requirements hardly constitutes the type of anticompetitive activity at which the Sherman Act is aimed. Unlike the accrediting association's conduct in *Marjorie Webster*, there is not even a possibility that the awarding of free broadcast time as a means of compliance with the Fairness Doctrine was actuated by a commercial, anticompetitive objective. By affording free advertising time, the defendants do not make any profit. Rather, they forgo paid advertising revenues. Furthermore, the parties are not business competitors. The Council's allegations that it was injured in its capacity as a purchaser of media advertising as a result of, in effect, respondents' compliance with the Fairness Doctrine are patently frivolous from an antitrust standpoint. Petitioner does not claim any restraint upon its ability to purchase advertising time, any fixing of advertising rates or any other sort of anticompetitive activity on the part of the respondents. Simply dressing up the otherwise innocuous conduct of the respond-

ents with antitrust terminology does not create a Sherman Act claim. Compare *McKay* v. *Columbia Broadcasting System, Inc.*, 324 F.2d 762, 763 (2d Cir. 1963); *Parmelee Transp. Co.* v. *Keeshin*, 292 F.2d 794, 804 (7th Cir.), cert. denied, 368 U.S. 944 (1961). Mere allegations of a conspiracy do not change the noncommercial nature of and motive behind the respondents' exercise of Fairness Doctrine responsibilities. Compare *Miller & Son Paving, Inc.* v. *Wrightstown Township Civ. Assn.*, 443 F. Supp. 1268 (E.D. Pa. 1978) (local citizens' group activity in opposition to zoning permits not actionable under Sherman Act). The alleged allocations of free air time "bear very little if any resemblance to the combinations normally held violative of the Sherman Act, combinations ordinarily characterized by an express or implied agreement or understanding that the participants will jointly give up their trade freedom, or help one another take away the trade freedom of others through the use of such devices as price fixing agreements, boycotts, market-division agreements and other similar arrangements." *Miller & Son Paving, Inc.* v. *Wrightstown Township Civ. Assn.*, 443 F. Supp. 1268, 1271 (E.D. Pa. 1978) (quoting *Eastern Railroad Presidents Conference* v. *Noerr Motor Freight, Inc.*, 365 U.S. 127 [1961]).

Furthermore, the Sherman Act has not been applied to private conduct of an essentially political nature and cannot properly be extended to the realm of Fairness Doctrine activity. For example, in *Eastern Railroad Presidents Conference* v. *Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961), this Court stated "that no violation of the [Sherman] Act can be predicated upon mere attempts to influence the passage or enforcement of laws." 365 U.S. at 135. The Court further stated:

> "[The Sherman Act] condemns trade restraints, not political activity, and, as we have already pointed out, a publicity campaign to influence governmental action clearly falls into the category of political activity. The proscriptions of the Act, tailored as they are for the business world, are not at all appropriate for application in the political arena. Congress has traditionally exercised extreme caution in legislating with respect to problems relating to the conduct of political activities . . .. All of this caution would go for naught if we permitted an extension of the Sherman Act to regulate activities of that nature simply because those activities have a commercial impact and involve conduct that can be termed unethical." 365 U.S. at 140-141.

More recently, *Noerr* principles have been applied to take out of the Sherman Act the conduct of persons who supported an initiative question, passage of which would have economically harmed their competitors. *Subscription Television, Inc.* v. *Southern Cal. Theatre Owners Assn.*, 576 F.2d 230 (9th Cir. 1978). Cf. *California Motor Transport Co.* v. *Trucking Unlimited*, 404 U.S. 508 (1972). See generally, Handler, *Twenty-Five Years of Antitrust*, 73 Colum. L. Rev. 415, 430-445 (1973).

While the *Noerr* exemption does not expressly apply to the present case, its underlying principles are very analogous. In *Noerr*, the conduct of the trade association was protected by First Amendment considerations. While the trade association in *Noerr* had the right to advertise politically, the broadcasters here were under a statutory duty to provide for the airing of views of persons opposing petitioner's referendum question position. The public's right to hear such views was protected by the First Amendment. *Red Lion Broadcasting Co.* v. *FCC*, 395 U.S. 367, 390 (1969). The providing of exposure of opposing views, required by the Federal Communications Act (47

U.S.C. § 315[a]) cannot logically amount to a restraint of trade or commerce in violation of federal antitrust law. Such a result could not have been intended by Congress and could only result from the type of overexpansive interpretation of the Sherman Act for which the petitioner here contends, but which the courts have already rejected. *Eastern Railroad Presidents Conference* v. *Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961); *Ve-ri-tas, Inc.* v. *Advertising Review Council of Metropolitan Denver*, 411 F. Supp. 1012, 1018 (D. Col. 1976).

That the respondents' conduct set forth in the complaint is not an antitrust matter is further manifested by petitioner's parallel effort to question it before the Federal Communications Commission. In fact, the complaint was not filed until after the FCC's broadcast bureau sustained the conduct of the broadcasters for Fairness Doctrine purposes. Thereafter, the full Commission affirmed that ruling (40 P & F Radio Reg. 2d 1509) and the Court of Appeals, in turn, affirmed the decision of the full Commission. *Council for Employment and Economic Energy Use* v. *FCC*, 575 F.2d 311 (1st Cir. 1978), cert. denied, ____ U.S. ____ (1978). Simply by bringing to the attention of this Court the second prong of its multifarious attack upon the conduct of the broadcasters, petitioner cannot transform an unwarranted antitrust claim into a novel or important issue deserving of review on a writ of certiorari. As stated by the Court of Appeals, "Petitioner's proper avenue for judicial relief was exercised through FCC administration channels and in judicial review of the FCC's decision. The antitrust laws provide no further remedy." 580 F.2d at 13.

B. *Petitioner Cannot Establish Any Injury to Business or Property by Reason of an Antitrust Violation.*

Petitioner's complaint is also deficient in that it fails to establish that it has suffered the requisite injury to its "business

or property" for standing under § 4 of the Clayton Act. It is well settled that "business or property" refers to "commercial interests or enterprises." *Hawaii* v. *Standard Oil Co.*, 405 U.S. 251, 264 (1972). The federal courts have consistently "confine[d] the availability of section 4 relief only to those individuals whose protection is the fundamental purpose of the antitrust laws." *Multidistrict Vehicle Air Pollution M.D.L. No. 31* v. *Automobile Manufacturers' Assn., Inc.*, 481 F.2d 122, 125 (9th Cir.), cert. denied *sub nom. Morgan* v. *Automobile Manufacturers' Assn.*, 414 U.S. 1045 (1973). As a political committee organized to defeat an initiative question, the petitioner is intertwined with the political process of Massachusetts (see generally Mass. Gen. Laws, c. 55, §§ 1 *et seq.*; Stewart, *The Law of Initiative Referendum in Massachusetts*, 12 New England L. Rev. 455 [1977]), rather than being engaged in any commercial activity within the meaning of the "business or property" requirement of § 4 of the Clayton Act. Even if petitioner is deemed to have a "business or property" interest as an advertiser, it cannot under any set of circumstances show injury to such an interest. While it did purchase advertising time from the broadcasters, it did not allege that its purchase of such time was in any way commercially affected by the complained of conduct of the broadcasters. For example, it alleges no impairment of any commercial contract right. Compare *North Texas Producers Assn.* v. *Young*, 308 F.2d 235, 243 (5th Cir. 1962). Nor has it alleged any restraint upon its ability to purchase advertising time, any fixing of advertising rates or any other anticompetitive injury to its advertising activity. Even the petitioner's proposed amended complaint alleges no more than that the granting of broadcast time to its initiative opponents induced it to place some of its message in other forms of media. Simply because of the Fairness Doctrine result that the right to buy radio time for political posturing on controversial issues carries with it the cer-

tainty of being rebutted over the same channel by someone expressing opposing views, and simply because the Council elected to curtail its own radio advertising as a means of muzzling the voice of its opponent, the Council cannot be said to have suffered injury to its business or property.

While the petitioner alleges monetary damages in the most conclusory terms, such damage, if any, is too remote from the conduct of the broadcasters to amount to "injury" for standing purposes in antitrust cases. *Multidistrict Vehicle Air Pollution M.D.L. No. 31* v. *Automobile Manufacturers' Assn., Inc.*, 481 F.2d 122 (9th Cir.), cert. denied *sub nom. Morgan* v. *Automobile Manufacturers' Assn.*, 414 U.S. 1045 (1973); *Miley* v. *John Hancock Mutual Life Insurance Co.*, 148 F. Supp. 299 (D. Mass.), affirmed per curiam, 242 F.2d 758 (1st Cir.), cert. denied, 355 U.S. 828 (1957). Compare *Brunswick Corp.* v. *Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477 (1977). Finally, it is a matter of public record that the initiative question opposed by petitioner was defeated and that the sole reason for petitioner's existence was accomplished.

Petitioner's allegations of injury to its business or property are insufficient to state a claim under § 4 of the Clayton Act for the further reason that such injury, even if assumed to exist, was not by reason of an antitrust violation (Part IA, *supra*). That its purchase of political advertising triggered the awarding of air time to its political opponents and that such awarding reduced the political value of its advertising[3] cannot be attributed to the type of anticompetitive activity at which the

[3] Petitioner now asserts "injury" in that the alleged allotting of the same ratio of advertising of opposing views precluded it from choosing the "best buy" in additional radio time. However, this strained assertion of injury overlooks petitioner's own allegation that the alleged allotment of opposing time was "without reference to the different coverage of [the ballot issue] afforded by each individual radio station owned by the defendants." Petitioner was thus free to seek out the "best buy" among the broadcasters.

Sherman Act is aimed. Even absent any violation of antitrust laws alleged by the petitioner, the broadcasters would still have granted (and been statutorily obliged to grant) reasonably balanced exposure to views on the referendum question in opposition to those of the Council. Petitioner did not allege, nor could it, that, absent the supposed conspiracy, the broadcasters would not have broadcast as much, or even more advertising opposing its views.

C. *Petitioner Cannot Now Seek Review by this Court on the Isuse of Injunctive Relief Which, in Addition, Affords No Basis for Review.*

Nor can petitioner now assert that it was improperly denied the injunctive relief prayed for in its complaint where it never formally moved for such relief in the District Court and neither briefed nor argued the issue before the Court of Appeals. *Helvering* v. *Minnesota Tea Co.*, 296 U.S. 378, 380 (1935). While the Court of Appeals noted petitioner's prayer for injunctive relief by way of footnote, it expressly avoided consideration of the injunctive relief issue. 580 F.2d at 10, n. 5. To the extent that the dismissal of the complaint imported a finding that injunctive relief was unwarranted, it was correct, for there was neither any likelihood of success on the merits (Parts IA, B, *supra*) nor of immediate, irreparable harm, since the public referendum had concluded and the Council position prevailed shortly after this action was commenced. 580 F.2d at 10, n. 5.

II. Petitioner's Motion to Alter Judgment and for Leave to File an Amended Complaint was Properly Denied as a Matter of Judicial Discretion and Petitioner has Failed to Argue the Denial of its Motion in its Petition as a Reason for Granting the Writ.

Review on writ of certiorari should not be afforded on the issue of the propriety of the denial of the Council's motion to alter judgment and for leave to file an amended complaint. While petitioner refers to the denial of this motion in the "Questions Presented" section of its petition, it has failed to argue the point. In any event, the court below acted within its discretion in denying the Council's motion, given the dismissal of the original complaint, the failure of the amended complaint to present any different claim (which the Council conceded below), and the futility of such an amendment. Compare *Foman* v. *Davis*, 371 U.S. 178 (1962). The motion merely sought review of the dismissal of the complaint without resort to the appellate process and was properly denied. *Kowall* v. *United States*, 53 F.R.D. 211, 216 (W.D. Mich. 1971). The routine, discretionary denial of the motion provides no reason for review by this Court.

Conclusion.

For the foregoing reasons the petition for a writ of certiorari should be denied.

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